

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
APRIL 4, 2002 Session

**MAURICE KARR, ET AL. v. PAUL C. GIBSON a/k/a PAUL CALVIN  
GIBSON**

**Direct Appeal from the Chancery Court for Davidson County  
No. 95-2473-I; The Honorable Irvin H. Kilcrease, Jr., Chancellor**

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**No. M2001-01449-COA-R3-CV - Filed June 7, 2002**

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This appeal arises from a complaint for a deficiency judgment filed by the Appellee against the Appellant in the Chancery Court of Davidson County. The trial court entered an order awarding the Appellee a deficiency judgment which included interest at the note rate of six percent per annum. The trial court also awarded the Appellee prejudgment interest at the rate of six percent per annum, expenses, costs, and attorney's fees.

The Appellee appeals the award of prejudgment interest and, in part, the award of attorney's fees entered by the Chancery Court of Davidson County. For the reasons stated herein, we reverse and remand.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Reversed and  
Remanded**

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Ramsey B. Leathers, Jr., Nashville, TN, for Appellant

Robert J. Notestine, III, Nashville, TN, for Appellee

**OPINION**

**I. Facts and Procedural History**

On September 29, 1989, the Appellant, Paul Gibson ("Mr. Gibson"), executed an installment deed note payable to the Appellee, Maurice Karr ("Mr. Karr"), in the amount of \$109,000.00 for the purchase of a condominium unit in Nashville, Tennessee. Mr. Gibson defaulted on the note, and Mr. Karr, as trustee on the note, sold the condominium unit at a foreclosure sale in June, 1994 for \$83,100.00.

On August 10, 1995, Mr. Karr filed a complaint against Mr. Gibson in the Chancery Court of Davidson County seeking a judgment for a \$37,810.14 deficiency. The complaint alleged that Mr. Gibson's mailing address was unknown but that Mr. Gibson was residing in Ontario, Canada. The complaint requested that Mr. Gibson be served by publication. The trial court entered an order allowing service by publication. In August and September, 1995, notice of the lawsuit was published in *The Nashville Record*. The clerk and master also mailed a copy of the notice of publication to Mr. Gibson's last known address in Nashville.

In October, 1995, Mr. Karr filed a motion for a default judgment against Mr. Gibson. On November 20, 1995, the trial court entered a default judgment against Mr. Gibson in the amount of \$48,992.87 plus court costs. On January 9, 1996, Mr. Karr informed Mr. Gibson's attorney that he had obtained a default judgment against Mr. Gibson. On February 16, 1996, Mr. Gibson filed a motion pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Mr. Gibson requested the trial court to set aside the default judgment on the grounds that the service of process by publication was defective and that he had no notice of the lawsuit prior to the entry of the default judgment. On March 18, 1996, the trial court denied Mr. Gibson's motion.

On April 10, 1996, Mr. Gibson appealed the default judgment to the court of appeals. The court of appeals held that a personal judgment could not be rendered against a nonresident defendant who was served only by publication. On February 13, 1998, the court of appeals vacated and remanded the default judgment of the trial court. The court of appeals assessed costs against Mr. Karr.

On December 3, 1998, Mr. Karr refiled the complaint against Mr. Gibson. The complaint sought damages in the amount of \$66,213.12. On January 28, 1999, Mr. Gibson filed an answer. On January 31, 2001, the trial was held on the complaint. On March 20, 2001, the trial court entered a final order awarding Mr. Karr a deficiency judgment in the amount of \$42,205.70 which included interest at the note rate of six percent per annum from June 2, 1994 through October 23, 2000. The trial court also awarded prejudgment interest from June 2, 1994 at the rate of six percent per annum in the amount of \$16,879.65, expenses in the amount of \$3,166.40, and costs. The trial court awarded Mr. Karr attorney's fees in the amount of \$5,437.50 which included the total attorney's fees incurred by Mr. Karr following the foreclosure. On April 18, 2001, Mr. Gibson filed a motion to alter or amend the judgment. On May 15, 2001, the trial court denied the motion to alter or amend the judgment. This appeal followed.

## **II. Standard of Review**

The standard of review for a non-jury case is *de novo* upon the record. See Wright v. City of Knoxville, 898 S.W.2d 177, 181 (Tenn. 1995). There is a presumption of correctness as to the trial court's factual findings, unless the preponderance of the evidence is otherwise. See TENN. R. APP. P. 13(d). For issues of law, the standard of review is *de novo*, with no presumption of correctness. See Ridings v. Ralph M. Parsons Co., 914 S.W.2d 79, 80 (Tenn. 1996).

### III. Law and Analysis

The following two issues are presented for our review:

1. Whether the trial court erred by awarding interest at six percent per annum plus prejudgment interest; and
2. Whether the trial court erred by awarding attorney's fees for matters related to the default judgment and the original appeal.

We will examine each issue in turn.

The first issue presented for our review is whether the trial court erred by awarding interest at the note rate of six percent per annum plus prejudgment interest. Section 47-14-123 of the Tennessee Code vests trial courts with the authority to grant awards of prejudgment interest as an element of damages. See TENN. CODE ANN. § 47-14-123 (1995). Prejudgment interest may not exceed the maximum effective rate of ten percent per annum. See id. Additionally, “contracts may expressly provide for the imposition of the same or a different rate of interest to be paid after breach or default.” Id.

In determining whether to award prejudgment interest, equity should serve as the guiding principle. See id.; Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998). The trial court must look to the facts of the case and determine whether awarding prejudgment interest would be equitable under the circumstances. See Myint, 970 S.W.2d at 927. In reaching an equitable decision, the trial court must remember that prejudgment interest is not awarded to punish a wrongdoer. See id. Rather, the purpose of prejudgment interest is to ensure that plaintiffs receive full and adequate compensation for their injuries. See id. Plaintiffs often receive two injuries due to a default on a note: damages from the default itself as well as lost use of funds over time resulting from the default. See Scholz v. S.B. Int'l, Inc., 40 S.W.3d 78, 82 (Tenn. Ct. App. 2000). By awarding prejudgment interest, the trial court compensates the plaintiffs for lost use of funds. See id.

“The award of prejudgment interest is within the sound discretion of the trial court and the decision will not be disturbed by an appellate court unless the record reveals a manifest and palpable abuse of discretion.” Spencer v. A-1 Crane Serv., Inc., 880 S.W.2d 938, 944 (Tenn. 1994) (citations omitted). The abuse of discretion standard “vests the trial court with considerable deference” when determining whether to award prejudgment interest. Myint, 970 S.W.2d at 927. The deference given to trial courts with regard to prejudgment interest, however, should not be “synonymous with rubber stamping a trial court’s decision.” Scholz, 40 S.W.3d at 82. Rather, “an abuse of discretion exists when the reviewing court is firmly convinced that the lower court has made a mistake in that it affirmatively appears that the lower court’s decision has no basis in law or fact and is therefore arbitrary, illogical, or unconscionable.” State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 191 (Tenn. 2000) (citations omitted).

In the case at bar, the trial court awarded Mr. Karr a deficiency judgment in the amount of \$42,205.70 which included interest at the note rate of six percent per annum from June 2, 1994 through October 23, 2000. The trial court also awarded prejudgment interest from June 2, 1994 at the rate of six percent per annum in the amount of \$16,879.65. Mr. Gibson argues that the trial court erred by awarding both interest under the note and prejudgment interest. We agree. By awarding interest of six percent per annum twice, once as interest under the note and once as prejudgment interest, the trial court, in effect, punished Mr. Gibson and granted Mr. Karr a windfall. As stated above, the purpose of prejudgment interest is not to punish the wrongdoer but to compensate the plaintiff for his injuries, or lost use of funds. Mr. Karr was compensated for his lost use of funds through the trial court's award of interest under the note; thus, the trial court erred by making an additional award of prejudgment interest. Accordingly, we reverse the trial court's award of prejudgment interest.

The second issue presented for our review is whether the trial court erred by awarding attorney's fees for matters related to the original appeal. In Tennessee, attorney's fees may be obtained by the prevailing party against the adverse party only when a statutory provision or a contractual agreement between the parties provides for attorney's fees as an element of damages. See John Kohl & Co, P.C. v. Dearborn & Ewing, 977 S.W.2d 528, 534 (Tenn. 1998); John J. Heirigs Const. Co., Inc. v. Exide, 709 S.W.2d 604, 609 (Tenn. Ct. App. 1986). In the absence of such statutory provision or a contractual agreement, the allowance of attorney's fees is contrary to public policy. See Gray v. Boyle Inv. Co., 803 S.W.2d 678, 684 (Tenn. Ct. App. 1990).

In the case at bar, the installment deed note provided that in the event Mr. Gibson defaulted, Mr. Karr was entitled to attorney's fees related to collection. The trial court awarded Mr. Karr attorney's fees in the amount of \$5,437.50, the total amount of attorney's fees incurred by Mr. Karr following the foreclosure. Mr. Gibson argues that the trial court erred by awarding attorney's fees related to the default judgment and original appeal. We agree. Mr. Karr failed to effect service of process upon Mr. Gibson in accordance with the Tennessee Rules of Civil Procedure which resulted in a default judgment against Mr. Gibson. The court of appeals held that the service of process was improper, vacated the default judgment, and assessed costs against Mr. Karr. We find that the trial court erred by awarding attorney's fees related to the default judgment and original appeal when Mr. Karr incurred those attorney's fees due to his own failure to effect proper service of process upon Mr. Gibson. Accordingly, we reverse the trial court's award of attorney's fees which were related to the default judgment and original appeal. We remand this issue to the trial court for a redetermination of attorney's fees in accordance with this opinion.

#### **IV. Conclusion**

For the foregoing reasons, the decision of the trial court awarding prejudgment interest and attorney's fees related to the default judgment and the original appeal is reversed. We remand this case to the trial court for a redetermination of attorney's fees in accordance with this opinion. Costs of this appeal are taxed against the Appellee, Maurice Karr, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE